No. 90-1014 (19)

In The

Supreme Court of the United States

October Term, 1990

ROBERT E. LEE, INDIVIDUALLY AND AS PRINCIPAL OF NATHAN BISHOP MIDDLE SCHOOL, ET AL.,

Petitioners,

v.

DANIEL WEISMAN, ETC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF AMICUS CURIAE OF THE CHRISTIAN LEGAL SOCIETY, NATIONAL ASSOCIATION OF EVANGELICALS, AND THE FELLOWSHIP OF LEGISLATIVE CHAPLAINS, INC. IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF THE CHRISTIAN LEGAL SOCIETY, NATIONAL ASSOCIATION OF EVANGELICALS, AND THE FELLOWSHIP OF LEGISLATIVE CHAPLAINS, INC. IN SUPPORT OF PETITIONERS

INTERESTS OF AMICI

The Christian Legal Society is a nonprofit professional association, founded in 1961, with a present membership of 3,500 Christian judges, attorneys, law professors and law students. Concerned about Constitutional rights, it founded the Center for Law and Religious Freedom in 1975 to protect and promote the freedoms guaranteed by the First Amendment through advocacy and education. The Center has been active in public education law issues, including equal access, religious time, curriculum and values, and freedom of speech. It has supported individual religious speech rights in public places, while opposing government-composed classroom prayers.

The National Association of Evangelicals is a nonprofit association of evangelical Christian organizations, colleges and universities, as well as some 50,000 churches from 74 denominations. It serves a constituency of approximately fifteen million people.

The Fellowship of Legislative Chaplains, Inc. is a tax exempt nonprofit association of chaplains serving the Congress and state legislatures nationwide.

The letters from the parties consenting to the filing of this brief have been filed with the Clerk pursuant to Rule 36.2.

SUMMARY OF ARGUMENT

This case challenges a public middle school commencement invocation and benediction by a guest speaker, Rabbi Leslie Gutterman, as violative of the Establishment Clause. Federal and state courts are now divided on the question. The lower courts in the present case have ruled against the practice. A divided panel of the Court of Appeals accepted the opinion of the district court, Pet. App. 18a-30a, in a cursory one-paragraph opinion. Pet. App. 2a. In the view of the amici, the opinion of the district court failed to consider general principles governing freedom of expression, and it overlooked several important distinctions between this case and prior rulings of this Court on prayer in public schools that render the practice at issue here constitutionally benign.

1. The prior restraint imposed on religious speech at the commencement exercise constitutes discriminatory content-based regulation of speech, which may not be censored merely because some hearers find it offensive. The judicial imposition of a prior restraint on religious speech must meet the same heavy burden of justification for this stark remedy that is required before other forms of speech may be banned.

2. The content-based regulation of the religious message of a private actor at an annual commencement ceremony is not required by the previous School Prayer decisions of this Court. The prayer prohibited by the Court of Appeals was not composed by the government, but by a rabbi acting authentically within his own religious tradition, and with sensitivity for the religious diversity of the audience. The prayer was not spoken by a governmental employee, but by a private actor invited as

a guest of the graduates to add a note of solemnity to an annual event.

The danger that students who are members of a minority religious faith or nonbelievers would be influenced to modify or abandon their belief or unbelief by the prayer offered by the rabbi in this case is diminished by the presence of their parents, family and friends, all voluntarily present at the commencement ceremony.

3. The criteria announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as modified by subsequent decisions, are not violated by a guest speaker's reference to the Deity at a prayer delivered at an annual commencement exercise. The requirement of a secular purpose is not violated when the government allows a guest speaker at a commencement ceremony to invoke the name of God in a benediction for reasons that are arguably secular, or for mixed secular and religious purposes. The principal or primary effect of inviting a guest speaker to offer a prayer at a commencement ceremony has not been to advance any particular religion, or religion in general. Inviting a private actor to speak freely and without prior censorship avoids governmental involvement in classifying religious practices and governmental monitoring of religious ministries. The political divisiveness standard has been relied upon only rarely, is at odds with the history and purpose of the First Amendment, and should be formally abandoned.

4. One of the principal historical purposes of both the Establishment Clause and the Free Exercise Clause was to avoid governmental coercion of faith or conduct at odds with religious conscience. The Court should reaffirm this insight in this case and use the earliest possible opportunity to correct the egregious error it committed

last Term in diminishing judicial protection of free exercise of religion to a virtual nullity in *Employment Division v. Smith*, 494 U.S. ___, 110 S.Ct. 1595 (1990).

ARGUMENT

I. PUBLIC SCHOOL OFFICIALS MAY ALLOW GUEST SPEAKERS TO ENGAGE IN RELIGIOUS EXPRESSION FREELY AT A GRADUATION CEREMONY.

A. Prohibition of the religious component of a message delivered by an invited guest at a public event constitutes discriminatory content-based regulation of speech.

The district court could not have made it clearer that the task it undertook was to regulate speech on the basis of its content. It made explicit the role of censorship it was performing by *rewriting* the benediction that Rabbi Gutterman "could have delivered," excising the reference to God as prohibited speech, but allowing the rest of the rabbi's well-chosen, inspirational words as permissible speech. Pet. App. 28a, n. 10.

This Court has repeatedly taught that the government may not discriminate in regulation of speech on the basis of the content of the message. *See, e.g., Police Dep't. of Chicago v. Mosley*, 408 U.S. 92 (1972). In *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court expressly extended this teaching to include religious speech, ruling that when the Government establishes a limited public forum, it may not exclude speakers from that forum simply because of the religious content of their message. It did so both because content-based regulation of speech violates familiar free speech principles, *id.*, 454 U.S. at 270, and

because this kind of discriminatory regulation is not required by the Establishment Clause, *id.*, 454 U.S. at 277-78. That teaching was confirmed in federal legislation securing the access by religious speakers on an equal basis to that enjoyed by other speakers in extracurricular activities in public secondary schools; and this Court sustained that legislation in *Bd. of Educ. of Westside Community Schools v. Mergens*, 495 U.S. ___, 110 S.Ct. 2356 (1990). Although the principles announced by this Court in *Widmar* and *Mergens* have application to the extracurricular activity of the commencement exercise at issue here, those precedents were ignored by the courts below.[1]

Telling a commencement speaker that his or her speech must be banned because it contains a religious reference is a prior restraint of the worst kind. It is not disputed on this record that the school may invite a member of the clergy to provide an invocation or benediction.[2] The only dispute is whether the clergy may make reference to the deity in their words or whether clergy is constitutionally obliged to leave unstated the one addressed in the invocation ("To whom it may

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[1] The only reference to either precedent is in Judge Bownes's concurring opinion in the Court of Appeals. Pet. App. 8a.

[2] At a hearing in the district court Judge Boyle asked counsel for the plaintiff: "Do you agree with the amicus brief that says inspirational secular speech is all right?" Counsel replied: "Yes. . . . What we are objecting to is the School Department's allowance of a prayer to a higher being." T. at 8. Judge Boyle later noted in his opinion that "[t]he plaintiff here is contesting only an invocation or benediction which invokes a deity or praise of a God." Pet. App. 28a.

concern") or the source of the blessings in the benediction ("O God, if you are, help us if you can").

Amici submit that the Free Speech Clause does not mandate the censorship of inspirational remarks to some lowest common denominator of a Hallmark card variety. As Justice Brennan put it, "The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring).

For the reasons set forth below, a school may allow a guest speaker at an annual commencement exercise to make ceremonial reference to or invoke the Deity and still achieve government neutrality as between religion or no religion, provided that the forum is made available on a nonpreferential basis and without governmental endorsement of the message of the speaker.

B. Religious speech may not be censored merely because some hearers find it offensive.

Respondent misperceives the limited role of government in regulating public speech. The government may not censor an invited guest at a public event merely because a word, otherwise protected, might offend someone. The narrowly focused objection of the respondent is to the word "God" heard by apparently unwelcoming ears. To the extent that respondent's constitutional claim rests on this sort of offense alone, it borders on the frivolous, for this Court has taught repeatedly that speech may not be censored merely because some hearers find it offensive. *See, e.g., Texas v. Johnson* 491 U.S. 397, 407 (1989).

The question of whether religious speech is "otherwise protected" should not, however, be begged either by the petitioner or the respondent. Our view is that intolerant exclusion of religious discourse from public expression violates the very spirit of the most central traditions about liberty that marks America as a free nation. Nothing, in fact, could be more offensive to the First and Fourteenth Amendments than to rule speech out of bounds because it might be "offensive" to some. To quote Justice Brennan again, "religious ideas, no less than any other, may be the subject of debate which is 'uninhibited, robust, and wide-open.' " *McDaniel, supra*, 435 U.S. at 640 (Brennan, J., concurring). Religious expression enjoys the same high protection as nonreligious speech. *See Widmar, supra*, 454 U.S. at 270. Just as the Equal Access Act granted "equal access to both secular and religious speech," so the commencement forum provided by the school here allows private speakers the opportunity to engage voluntarily in speech of their choice, whether religious or nonreligious in form or content. *See Mergens, supra*, 110 S. Ct. at 2371.

We thus conclude that censorship of the religious speech of an invited guest at a voluntary, ceremonial, public, and civic event merely because someone may take offense at its religious content violates the central commitment of the Free Speech Clause to the proposition that speech is cured by more speech, not less. *See, e.g., Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence"). It sends the discriminatory message that nonreligious speech enjoys a higher constitutional

protection than religious speech. Hence respondent may not use the Establishment Clause as a weapon to silence a legitimately invited guest engaging in otherwise protected speech. *See* sections II and III, below.

The Williamsburg Charter, a bicentennial document celebrating the Religion Clause, urges Americans to adopt a more open attitude about the legitimate role of religion in public life. The document suggests that the view that "the American people's historically vital religious traditions were at best a purely private matter and at worst essentially sectarian and divisive . . . betrays a failure of civil respect for the conviction of others." *Williamsburg Charter*, 8 J. L. & Relig. 5, 12 (1990). The very pluralistic character that some rely upon to exclude any form of religious speech in the public forum – even at a public, voluntary, civic and ceremonial event of the sort at issue here – may also be invoked as the reason for greater toleration, not greater repression and censorship. In the words of the Williamsburg Charter:

> One of the ironies of democratic life is that freedom of conscience is jeopardized by false tolerance as well as by outright intolerance. Genuine tolerance considers contrary views fairly and judges them on merit. Debased tolerance so refrains from making any judgment that it refuses to listen at all. Genuine tolerance honestly weighs honest differences and promotes both impartiality and pluralism. Debased tolerance results in indifference to the differences that vitalize a pluralistic democracy. *Id.*, 8 J. L. & Relig. at 19.

Governmental neutrality among faiths honors the pluralistic character of this country, but the principle of neutrality does not countenance government indifference

or hostility to religion, nor require its censorship in voluntary public fora. *See* Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 De Paul L. Rev. 993 (1990).

C. The judicial imposition of a prior restraint on religious speech must meet the same heavy burden of justification for this stark remedy that is required before other forms of speech may be banned.

This Court has also taught that one who seeks to impose a prior restraint on speech bears a heavy burden of justification for this stark remedy. *See, e.g., Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971). When the judiciary is the source of the power issuing the prior restraint, the burden of justification is all the more heavy, not less so, because of the judicial oath to support the Constitution. *See, e.g., Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539 (1976) ("gag order" may not be sustained against the press even to protect the constitutional value of a fair trial before an impartial jury). These precedents were overlooked in the opinions below.

In this case, the judiciary issued a partial "gag order" on future guest speakers at commencement exercises, requiring them to keep silence about their religious convictions relating to the graduates. The putative justification for this "gag order" is the requirement the government refrain from establishing a religion. That constitutional duty is no less significant than the duty to proceed fairly against those accused of crime, which was not sufficient by itself in *Nebraska Press Ass'n.* to overcome the high presumption against prior restraints. This does not mean that a prior restraint against religious speech could never be required under the Establishment

Clause. Both *Engel v. Vitale*, 370 U.S. 421 (1962) and *Abington Township School Dist. v. Schempp*, 374 U.S. 203 (1963) hold to the contrary. But it does mean that – in order to satisfy the requirements of the Free Speech Clause – more careful analysis of the potential Establishment Clause violation is required than was undertaken here. *See* Sections II and III, below.

II. Content-based Regulation of Religious Speech by a Private Actor at an Annual Graduation Ceremony is Not Required by the Previous School Prayer Decisions of this Court.

A. The prayer prohibited by the Court of Appeals was not composed by the government, but by a rabbi acting authentically within his own religious tradition, and with sensitivity for the religious diversity of the audience.

This Court has taught that prayer composed by the government violates the Establishment Clause. In contrast to the "Regent's Prayer" invalidated in *Engel, supra*, the prayer offered on the occasion of the commencement exercise at issue here was composed by a rabbi acting authentically within his own religious tradition and with sensitivity for the reality that those who would hear the prayer were of many differing religious backgrounds.[3]

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[3] The prayers offered by Rabbi Gutterman are included in the opinion of the district court. Pet. App. 20a, notes 2 & 3. A pamphlet prepared by the National Conference of Christians and Jews, entitled "Guidelines for Civic Occasions," was available to the rabbi. The guidelines suggest methods of composing "public prayer in a pluralistic society," stressing "inclusiveness and sensitivity" in the structuring of non-sectarian prayer. Pet. App. 19a.

B. The prayer prohibited by the Court of Appeals was not spoken by a governmental employee, but by a private actor invited as a guest of the graduates to add a note of solemnity to an annual event.

As the Court has taught in *Schempp, supra*, a governmental employee must refrain from devotional recitation of the Lord's Prayer or the reading of the Bible as devotional literature. In contrast with the practice invalidated in *Schempp*, the prayer offered here was not spoken by a governmental employee, but by a private actor invited as a guest of the graduates to add a note of solemnity to an annual event.

It is constitutionally significant to distinguish between government speech that advocates a religiously partisan message to school children on a daily basis in a classroom and a private speaker who invokes a deity at annual commencement exercises. Although teachers may not promote sectarian tenets in public school classrooms, students are free to communicate with other students in appropriate times and settings about religious subjects, to pray, or to otherwise refer to ultimate concerns. The critical distinction concerning the status of the speaker in the public school setting has been definitively expounded by this Court. As the Court said recently in *Mergens*, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion which the Free Speech and Free Exercise Clauses protect." 110 S. Ct. at 2372 (emphasis in original). *See* Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U. L. Rev. 1, 11 (1986) ("That the government cannot express religious opinions does not

mean that it can censor religious expression by private speakers.").

The context within which the "offending" eight words were spoken by Rabbi Gutterman is also crucial. The setting was a middle school commencement *ceremony*. Public school commencement exercises have provided a traditional and time-honored civic and inspirational moment when students, accompanied by parents, family, friends and honored guests, are asked to celebrate their academic achievement and accept the common responsibility to carry on the important values and virtues necessary to a democratic and free society. The completion of an educational milestone marked by a commencement ceremony takes the form of a public moment, inherently different from other instructional and curricular events. There are several important distinctions between the way public education traditionally provides closure to and public recognition of academic achievement and the way it conducts its educational mission in the classroom.

The following attributes of these kinds of ceremonies support the conclusion that the invocation and benediction offered here was wholly protected by the First Amendment Speech Clause and does not offend the Establishment Clause.

1. Participation in a commencement is typically *voluntary*.[4] Students are invited, not compelled, to receive

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[4] Respondents and their amici may argue that the voluntary character of such participation in prayer would be heightened by confining all religious speech to a separate

(Continued on following page)

their diplomas and to receive public recognition for their academic achievement.

2. Commencement is a *ceremonial* event. It is not a required part of the curriculum, but an extracurricular rite of passage, marking the completion of studies and honoring academic achievement. Ceremony and ritual add dignity and importance to the event. It should come as no surprise, then, that the participants in the event should plan to include *ceremonial* speech, including an address by a visiting dignitary and – as here – an invocation and a benediction with reference to the Deity. Speech of this nature serves the legitimate purpose of enhancing the solemnity, dignity, and decorum of an important civic ceremony.

3. A commencement is a *public* event attended by elected local officials, school board members, community leaders, invited guests, teachers, administrators, staff, students, their parents, family and friends. The public nature of the proceedings and the presence of parents act as a buffer against religious coercion. *Stein v. Plainwell Community Schools*, 822 F.2d 1406, 1409-10 (6th Cir. 1987).

(Continued from previous page)

baccalaureate service. Although true, this observation is irrelevant to the disposition of this case, for the First Amendment does not require that speech be censored or confined to another forum merely because it is offensive, but only when there is present some principle that might serve to limit speech, such as nonestablishment of religion, *Engel, supra*, and *Schempp, supra*, or the probability of imminent public danger, *Brandenburg v. Ohio*, 395 U.S. 444 (1969). A violation of the nonestablishment principle, moreover, may not be assumed simply because of the religious content of speech. *See Widmar, supra*, and *Mergens, supra*.

4. A commencement is a *civic* event. The government provides a forum in which inspirational addresses, invocations and benedictions concern common responsibilities and allegiances. The event evokes the recalling of history, the quoting of famous persons, and the reciting of poetry. It invokes Divine Providence to provide the blessings of liberty. At its best, it embraces persons of all races, colors and creeds. It is a civic event where Americans meet, where their differences count, where their rights are respected.[5] The civic character of the event demonstrates the pluralistic character of the nation by inclusion, not exclusion, of different viewpoints that are necessarily present when invited guests provide their own commentary on subjects appropriate to the public occasion.

C. The danger that students who are members of a minority religious faith or nonbelievers would be influenced to modify or abandon their belief or unbelief by the prayer offered by the rabbi in this case is diminished by the presence of their parents, family and friends, all voluntarily present at the commencement ceremony.

This Court noted in *Schempp, supra*, that in a classroom setting where the concern about a "captive

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[5] For example, the flag might be presented as a symbol of national unity and saluted in the Pledge of Allegiance, with its description of ourselves as "one nation under God." After *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), this does not means that Jehovah's Witnesses could be required to join in this part of the ceremony. By the same token, respect for the conscience of Jehovah's Witnesses does not mean that this part of the ceremony must be eliminated from the program. Analogously, some may disagree with the religious sentiments articulated by a guest speaker, but that does not entitle them to censor the speaker.

audience" of young, impressionable children, there may be a sufficient degree of "subtle coercion" or peer pressure to warrant the protection of the Establishment Clause. In contrast to the compulsory context in *Engel* and *Schempp*, no student was required to be present for the commencement exercise at issue here. The danger that students who are members of a minority religious faith or nonbelievers would be influenced to modify or abandon their belief or unbelief by the prayer offered by the rabbi in this case is diminished by the presence of their parents, family and friends, all voluntarily present at the commencement ceremony. *Stein, supra*, 822 F.2d at 1409-10.

III. THE CRITERIA ANNOUNCED IN *LEMON v. KURTZMAN*, AS MODIFIED BY SUBSEQUENT DECISIONS, ARE NOT VIOLATED BY A GUEST SPEAKER'S REFERENCE TO THE DEITY IN A PRAYER DELIVERED AT AN ANNUAL COMMENCEMENT EXERCISE.

The three-part test in *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971), has been materially altered by this Court since its promulgation over 20 years ago. Much of the criticism of *Lemon* is based on a literal and often mechanical application of the purpose, effect, and entanglement formulation, rather than on a careful reading of the test as it has evolved in the Court's subsequent decisions. Hence we do not urge that the Court abandon *Lemon* altogether, but that it use this case to clarify the standards governing Establishment Clause cases. *See* Esbeck, *The Lemon Test: Should It Be Retained, Reformulated or Rejected?* 4 Notre Dame J. of L., Ethics & Pub. Pol. 513 (1990).

A. The requirement of a secular purpose is not violated when the government allows a guest speaker at a commencement ceremony to invoke the name of God in a benediction for reasons that are arguably secular, or for mixed secular and religious purposes.

To survive Establishment Clause analysis, a law must have, according to the first of the three requirements laid down in *Lemon*, a "secular legislative purpose." This test has been decisive only in cases involving religion in the public schools. *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Stone v. Graham*, 449 U.S. 39 (1980); *Wallace v. Jaffree*, 472 U.S. 38 (1985); and *Edwards v. Aguillard*, 482 U.S. 578 (1987). In other cases discussing the secular purpose requirement, the Court has clarified that it will invalidate legislation on this ground "only if it is motivated wholly by an impermissible purpose," *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988); *see Lynch v. Donnelly*, 465 U.S. 668, 680 (1984), or only when it can be said that the law's "pre-eminent purpose . . . is plainly religious in nature." *Stone, supra*, 449 U.S. at 41; *see Edwards, supra*, 482 U.S. at 590. Conversely, the Court has said that "a statute that is motivated in part by a religious purpose" does not violate the purpose prong, *Jaffree, supra*, 472 U.S. at 56. Neither is it required that a "law's purpose must be unrelated to religion," for that would require government to "show a callous indifference to religious groups." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987). As reformulated, then, the proper inquiry is whether the *sole* purpose of the law is to advance religion. When government acts either out of apparent reasons that are arguably secular, or with mixed secular and religious purposes, the first prong of *Lemon* is not violated.

After some confusion, it is now clear that the first prong of *Lemon* involves scrutiny of the objective purpose of the law or practice under examination, not the subjective motive of the legislator or administrator.

> Even if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law.

Mergens, supra, 110 S. Ct. at 2371 (1990) (emphasis in original).

This Court has in most cases easily found a permissible purpose of a law in its language, its legislative history, or simply by exercising common sense. As can be expected, current application of the purpose prong will only rarely result in invalidation of a rule or statute. *See Bowen v. Kendrick, supra*, 487 U.S. at 634 (Blackmun, J., dissenting). The purpose inquiry should be limited to analysis of the objective purpose of the law as manifested by facial analysis and the official legislative record. *Jaffree, supra*, 472 U.S. at 75-76 (O'Connor, J., concurring). "Given the many hazards involved in assessing the subjective intent of governmental decisionmakers," *Edwards, supra*, 482 U.S. at 639 (Scalia, J., dissenting), the "question of [the] constitutionality [of legislation] cannot rightly be disposed of on the gallop, by impugning the motives of its supporters." *Id.* at 611. The school's invitation to a guest speaker to give the invocation and benediction satisfies the deferential purpose test. There is a long history and tradition of such community participation in

commencement exercises for legitimate purposes such as adding solemnity and dignity to the event.

B. The principal or primary effect of inviting a guest speaker to offer a prayer at a commencement ceremony has not been to advance any particular religion, or religion in general.

Lemon's second prong required that the "principal or primary effect" of a law or governmental policy "must be one that neither advances nor inhibits religion." Conversely, this Court has sustained the constitutionality of laws that have only an incidental or de minimis effect of advancing religion. *See, e.g., Widmar, supra*. When religion is materially advanced by a law, albeit unintentionally, presumably the effect or impact will be apparent from the day-to-day operation of the law. That is, in a straightforward application of an effect test, a court would inquire whether there is measurable, palpable evidence – not a mere "risk" or "fear" – that a religion (or religion generally) is advanced. *See, e.g., Amos*, 483 U.S. at 337 ("no persuasive evidence in the record" that exemption of religious bodies in Title VII had the effect of strengthening their ability to propagate religious doctrine); *Widmar, supra*, 454 U.S. at 275 ("in the absence of empirical evidence that religious groups will dominate [the university's] open forum, we agree with the Court of Appeals that the advancement of religion would not be the forum's 'primary effect.'").

The record here is devoid of evidence that a particular religion, or religion in general, has been on the rise within Nathan Bishop Middle School or in the community of Providence as a result of their long history of commencement invocations and benedictions. Indeed, the

recent pattern in the defendant school district of such public references to the Deity is one of increasing inclusiveness of additional religious groups and tolerance toward dissenters. Short of evidence that the practice in question has spawned incidents of discrimination or the like, mere "feelings" of being offended are not palpable evidence that religion has been advanced contrary to *Lemon*'s second prong.[6]

C. The invitation of a guest speaker to offer a prayer at a commencement ceremony avoids governmental entanglement in classifying religious practices and governmental monitoring of religious ministries.

The third prong of *Lemon* required an examination concerning whether the law in question fostered excessive administrative entanglement between the offices of government and religious organizations. The recurring themes of avoiding governmental involvement in classifying religious practices and avoiding the monitoring of religious ministries were brought together in *Widmar, supra*. Although permitting use of buildings and other facilities by student groups, the state university in *Widmar* sought to bar use by student groups that had a

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[6] Amici acknowledge that in some cases involving financial aid to schools and other institutions operated by churches, this Court has not required measurable evidence that the primary effect of the aid has been to advance religion. Rather, because the Court has apparently regarded these institutions to be "pervasively sectarian," the Court has been willing to strike down legislation merely because of the risk that religion might be advanced by the aid. But this case involves a public school, not one operated by a church. Hence the concern about a "pervasively sectarian" institution does not apply here.

religious purpose. On the basis of speech and associational freedoms, this Court upheld the right of student groups with a religious focus to use university facilities on an equal basis with all other student groups. The dissent argued that the Establishment Clause permitted the university to deny use of its facilities for "religious worship," although it was agreed that "religious speech" could not be excluded based on the Court's precedents prohibiting content-based censorship. 454 U.S. at 283-286 (White, J., dissenting). The majority rejected this suggested distinction between "worship" and "religious speech" on entanglement-avoidance grounds. The Court pointed out that the distinction would (1) compel the university "to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith," *id.* at 269-270 n.6, and (2) foster "a continuing need to monitor group meetings to ensure compliance with the rule," *id.* at 272 n. 11.

Applying this standard to this case, amici are of the view that – far from entangling the government in classifying religious practices and in extensive monitoring of religious ministries – the invitation of a guest speaker to offer a prayer at an annual commencement ceremony avoids difficulties of this sort.

D. The political divisiveness standard has been relied upon only rarely, is at odds with the history and purpose of the First Amendment, and should be formally abandoned.

Another standard enunciated in *Lemon* is that political divisiveness along religious lines may constitute an independent ground for nullifying legislation challenged under the Establishment Clause. The Court subsequently

narrowed the application of this standard to cases involving financial assistance to religious schools. *Mueller v. Allen*, 463 U.S. 388 (1983). The author of *Lemon*, Chief Justice Burger, later acknowledged that this standard should not function as an independent ground for nullifying a practice such as that at issue here. *Lynch v. Donnelly*, 465 U.S. 668 (1984). *See Bowen, supra*, 487 U.S. at 617 n. 14; *Amos, supra*, 483 U.S at 339 n. 17. Despite these clear signals that this test is no longer a valid criterion for an establishment violation, the test resurfaced once in this Court, *Aguilar v. Felton*, 473 U.S. 402 (1985), and continues to have more vitality in the lower courts than it deserves. *See e.g., Cammack v. Waihee*, 59 U.S.L.W. 2689 (9th Cir. April 30, 1991) Amici urge the Court to abandon the political divisiveness test because it is at odds with the history and purpose of the First Amendment. See Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 St. Louis U. L. J. 205 (1980).

The Court's refinement of the *Lemon* test preserves for government its essential neutrality toward religious influence in public settings, without governmental endorsement of religion and without governmental hostility toward religion. It allows religious discourse to compete freely in the marketplace of ideas, which is "neither a naked public square where all religion is excluded, nor a sacred public square with any religion established or semi-established . . . . [but] a civil public square in which citizens of all religious faiths, or none, engage one another in the continuing democratic discourse." *Williamsburg Charter, supra*, 8 J. L. & Relig. at 18.

IV. ONE OF THE PRINCIPAL HISTORICAL PURPOSES OF BOTH PROVISIONS OF THE RELIGION CLAUSE WAS TO AVOID GOVERNMENTAL COERCION OF FAITH OR CONDUCT AT ODDS WITH RELIGIOUS CONSCIENCE.

This case affords the Court the opportunity to clarify the general standards governing Establishment Clause jurisprudence. The path of the law deriving from *Lemon* has not been smooth. Members of this Court[7] and commentators[8] have pointed out anomalies and difficulties with the fruit of the *Lemon* tree. Although the *Lemon* test – as announced twenty years ago – has proved unworkable as a general statement of constitutional principles, several cases since then have contained helpfully nuanced reformulations of those principles. The Court should use this case as a vehicle to announce with greater clarity the principles governing the interpretation of the Religion Clause, particularly the historically accurate reflection that the object of both the Establishment Clause and the Free Exercise Clause was to avoid governmental coercion of faith or conduct at odds with religious conscience.

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[7] *See, e.g., County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 109 S.Ct. 3086, 3134-45 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part); *Edwards, supra*, 482 U.S. at 636-40 (Scalia, J., dissenting); *Jaffree, supra*, 472 U.S. at 69-70 (O'Connor, J., concurring); *id.* at 92-115 (Rehnquist, J., dissenting); and *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980).

[8] *See, e.g.*, Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673 (1980), and Ripple, *The Entanglement Test of the Religion Clauses - A Ten Year Assessment*, 27 U.C.L.A. L. Rev. 1195 (1980).

The petition for certiorari presents the question "whether direct or indirect government coercion is a necessary element of an Establishment Clause violation." Pet. i. The Solicitor General has likewise urged this Court to address the question of coercion. Brief Amicus Curiae of the United States, i. Amici assume that the Petitioner and the United States will address their views on this matter fully in their briefs.

A. The Court should reaffirm that some element of coercion is necessary to create a prima facie violation of the Religion Clause.

Our concerns about reintroducing the coercion element into Establishment Clause jurisprudence are twofold. On the one hand, greater accuracy about the historical record is preferable to the general state of confusion created by the meandering path the Court has followed on this matter. On the other hand, it would be puzzling if the Court undertook here to reinstate the coercion element in Establishment Clause jurisprudence just after it reduced the coercion element to a virtual nullity in Free Exercise Clause jurisprudence last Term in *Employment Div. v. Smith*. Amici offer three suggestions for getting out of this recently created dilemma: (1) reinstating the Court's earlier teaching that coercion is an element of an Establishment Clause violation; (2) clarifying what is meant by "coercion" of religious conscience in our modern welfare state, and (3) recognizing the complementary purposes of both provisions of the Religion Clause.

First, the Court should acknowledge that, as with other aspects of its teaching on the Religion Clause, the treatment of the coercion theme has not been a model of

consistency. For example, Justice Black wrote in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) that the core meaning of the Establishment Clause is that neither "a state nor the Federal Government . . . can *force* or influence a person to go to or to remain away from church against his will or *force* him to profess a belief or disbelief in any religion. No person can be *punished* for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance." 330 U.S. at 15 (emphasis added). This is manifestly the language of coercion.[9]

Ignoring the clear teaching of history about the coercive nature of an established religion – a matter at the very heart of James Madison's *Memorial and Remonstrance*, cited as an Appendix in *Everson, supra*, 330 U.S. at 63-72 – this Court has nonetheless suggested recently that coercion is not present when tax funds are used to advance religious education. *Tilton v. Richardson*, 403 U.S. 672, 689 (1971) (no free exercise claim because plaintiffs were unable to identify any coercion); *Bd. of Educ. v. Allen*, 392 U.S. 236, 248-249 (1968) (same). This case presents the Court with the opportunity to again recognize that coercion is of the essence of what the no-establishment provision forbids.

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[9] The same Justice Black could write in *Engel, supra*, 370 U.S. at 430, without so much as a word of explanation or a single precedent in support of the revisionist view that "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion. . . . " Justice Black did, however, acknowledge in *Engel* that "laws officially prescribing a particular form of religious worship . . . involve coercion of such individuals" and that "indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain" when "the power, prestige, and financial support of government is placed behind a particular religious belief." *Id. See* McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933 (1986).

Second, the Court should clarify what is meant by religious coercion in the contemporary world. One need not suffer the same sort of criminal penalties (including the death penalty) or deprivations of civil liberties (including denial of franchise and office-holding, of property rights, and of rights to marry and to follow a lawful vocation) that were extant in the eighteenth century[10] in order to be found to suffer an unconstitutional restraint on religious freedom in the modern welfare state. In *Sherbert v. Verner*, 374 U.S. 398 (1963), this Court clarified that requiring a choice between receipt of a welfare benefit and fidelity to religious conscience exacts an impermissible *penalty* on religion. A decade ago the Court reiterated this point in *Thomas v. Review Board*, 450 U.S. 707 (1981):

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. *Id.* at 717-718.

This teaching is not limited to free exercise cases. In *Everson, supra*, the Court rejected an Establishment Clause challenge to a governmental subsidy of transportation of children attending religious schools. It did so out of repugnance at the potential denial of a general welfare benefit on the basis of one's religious commitment. 330 U.S. at 16. A careful reading of the record in *Schempp, supra*, suggests that although the Court stated in dictum

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[10] *See*, e.g., C. Antieau, A. Downey, and E. Roberts, *Freedom From Federal Establishment* 1-29 (1964).

that coercion would no longer be thought to be an element of an Establishment Clause violation, the Court was actually holding that even subtle forms of coercion – undue governmental *influence* of the religious choice of children compelled to attend school – violate the no-establishment principle. *See* Section II. C, above.

The standard for the burden triggering relief under either provision of the Religion Clause should be the same: coercion of religious choice.[11] After *Employment Div. v. Smith*, however, it is necessary to add that judicial relief from coercion of religious conscience is not an unaffordable "luxury," but "an essential element of liberty." 110 S.Ct. at 1616 (Blackmun, J., dissenting).

Third, the Court should use this case as a vehicle for clarifying that the purposes of both the Establishment Clause and the Free Exercise Clause are more in harmony than in tension. In the words of the Williamsburg Charter, the "mutually reinforcing provisions act as a double guarantee of religious liberty." *Williamsburg Charter, supra*, 8 J. L. & Relig. at 6. As things now stand, some of this

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[11] Noncoercion may protect nonbelievers as well as believers. Thus, tuition grants from coercively collected tax revenues that are made available only to students at religious schools would interfere with religious choice and thus violate the Establishment Clause. See McConnell, *Coercion: The Lost Element of Establishment, supra*, 27 Wm. & Mary L. Rev. at 940; Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875, 921 (1986). The Establishment Clause, however, is not violated by governmental funding that advances a neutral governmental interest and is made available on an evenhanded basis to individuals and to institutions that are not "pervasively sectarian." *See Bowen v. Kendrick*, 487 U.S. 589 (1988), and *Witters v. Washington Dep't. of Services for the Blind*, 474 U.S. 481 (1986).

Court's cases have produced widespread confusion about the purposes of these two provisions of the Religion Clause, as though they were at loggerheads with one another.

Each provision of the Religion Clause has a distinct purpose, but those purposes are complementary, not contradictory.[12] But the outcome of a case should not depend on the cleverness of the lawyers in characterizing the claim under one clause or the other.

Under the "tug-of-war" view of the Religion Clause, one provision could virtually nullify the other if both were given full scope. The Court has tried to avoid a reduction of the constitutional text to an absurdity. *See, e.g., Walz v. Tax Comm'n*, 397 U.S. 664, 668-69 (1970). In so doing, the Court has taught about a "tension" between the two provisions, and has elaborated different criteria for adjudication of claims arising under either provision. Thus, before *Smith* the primary distinction between this

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[12] Commentators differ in their reading of the purposes of the two provisions of the Religion Clause. Some place the avoidance of official governmental approval and support under the Establishment Clause, and the protection of individual and communal religious faith and conduct under the Free Exercise Clause. *See, e.g.*, Riggs, *Judicial Doublethink and the Establishment Clause: The Fallacy of Establishment by Inhibition*, 18 Valparaiso U. L. Rev. 285 (1984). Others argue that the Establishment Clause was designed to protect church autonomy and individual religious liberty. *See, e.g.*, A. Adams & C. Emmerich, *A Nation Dedicated to Religious Liberty: The Constitutional Heritage of the Religion Clauses* 28-31 (1990); and W. Estep, *Revolution Within the Revolution: The First Amendment in Historical Context, 1612-1789*, 156-79 (1990).

Court's analysis under the Free Exercise and Establishment Clauses was that a free exercise claim required a showing of coercion but a no-establishment claim did not. *See Tilton, supra,* and *Allen, supra.* This led commentators to note that adopting a coercion test in place of *Lemon* would make the tests for free exercise and no-establishment redundant. See Esbeck, *The Lemon Test, supra,* 4 Notre Dame J. of L., Ethics & Pub. Pol. at 544; Laycock, *"Nonpreferential" Aid to Religion, supra,* 27 Wm. & Mary L. Rev. at 922. After the *Smith* decision, the redundancy is gone, replaced with a new anomaly: the Establishment Clause (if reduced to preventing coercion) is the primary constitutional bulwark for protecting the exercise of an individual's conscientious religious beliefs!

B. The Court should use the earliest possible opportunity to correct the radical diminution of judicial protection of free exercise of religion that it announced in *Employment Div. v. Smith*.

Last Term, on January 17, 1990, the Court relied unanimously on the "compelling state interest" standard that had given some hope of meaningful judicial protection of the Free Exercise Clause. *Jimmy Swaggart Ministries v. Bd. of Equalization,* 493 U.S. 378 (1990); *see also* the unanimous opinion of the Court in *Frazee v. Illinois Dep't. of Employment Sec.,* 489 U.S. 829 (1989). On April 17, in *Employment Div. v. Smith,* a majority of the Court announced a sudden departure from the free exercise jurisprudence it had elaborated in *Sherbert.* It did so without briefing or argument in an opinion that

commentators have already noted to contain serious flaws.[13] In effect, *Smith* reduced judicial protection of free exercise of religion as an independent constitutional value to a virtual nullity. The impact of this case on the lower courts has already been a severe blow to protection of free exercise of religion.

Amici raise the issue of the *Smith* case because the free exercise provision must be construed in harmony with the nonestablishment provision to achieve the common purpose of the Religion Clause, the protection of religious liberty.[14] For this Court to adjust its nonestablishment jurisprudence without restoring constitutional significance to the free exercise provision would be like overhauling the jet engine on one wing of an airplane while leaving the other engine inoperable. The Court should use the earliest possible opportunity to correct its radical diminution of judicial protection of free exercise of religion in *Smith.*

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[13] *See, e.g.,* Laycock, *The Remnant of Free Exercise,* 1990 S. Ct. Rev. ___; Laycock, *The Supreme Court's Assault on Free Exercise and the Amicus Brief That Was Never Filed,* 8 J. L. & Relig. 71 (1990); McConnell, *Free Exercise Revisionism and the Smith Decision,* 57 U. Chi. L. Rev. 1109 (1990); and Gordon, *Free Exercise on the Mountain Top,* 79 Calif. L. Rev. ___ (1991).

[14] *See, e.g.,* McConnell, *Accommodation of Religion,* 1985 S. Ct. Rev. 1; and see McConnell, *The Origins and Historical Understanding of Free Exercise of Religion,* 103 Harv. L. Rev. 1409 (1990).

CONCLUSION

The Court of Appeals should be reversed.

Respectfully submitted,

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